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85-2134

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
PETITIONER,

v.

JOHN J. BUCKLEY, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

KIERAN B. MEAGHER*
ROBERT J. OWENS
ROBERT D. CITY
ROBERT J. OWENS ASSOCIATES, P.C.
Fifty Congress Street
Boston, Massachusetts 02109
Telephone: (617) 523-3050

* Counsel of Record

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

I.

Question Presented

1. Did the Court of Appeals for the First Circuit err in affirming the entry of summary judgment by the District Court for the District of Massachusetts that plaintiff had failed to state a claim under the provisions of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983 where state mental health officials, county prison officials, and other county officials had knowledge of a county prisoner's announced intention to kill plaintiff's decedent, permitted his release on a two-day furlough, and the prisoner kidnapped and murdered plaintiff's decedent within twenty-four hours of his release?

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Estate of Patricia E. Gilmore, Joseph P. Gilmore, Executor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered March 31, 1986, in this proceeding.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 787 F.2d 714 (1st Cir. 1986), and appears in Appendix A, p. A-1. The opinion of the United States District Court for the District of Massachusetts is reported at 608 F. Supp. 554 (D. Mass. 1985) and appears in Appendix B, p. A-17.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Amendments and Federal Statutes Involved

U.S. Const. Amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

A. *Prior Proceedings*

Petitioner is Joseph P. Gilmore, father of Patricia E. Gilmore (Patricia), and administrator[1] of her estate. Patricia's kidnapping and murder on December 20, 1979 give rise to this action. The defendants are state executive officials[2] who were responsible for the operation of Bridgewater State Hospital (Bridgewater) and for the performance of psychiatric examinations of the prisoner carried on there, Middlesex County and certain county officials[3] responsible for the operation of the Billerica House of Correction (Billerica) at the times pertinent to this action.

On August 1, 1980, Gilmore filed his complaint. All defendants, except Ralph J. Bens (Bens), filed motions to dismiss. Bens filed an answer on November 18, 1980. The motions to dismiss were denied after extensive briefing and hearing by the lower court on May 5, 1981.

After extensive pretrial discovery, all defendants moved for summary judgment in their favor, and plaintiff moved for partial summary judgment, on the issue of liability only, as to certain defendants and dismissed his action as to others. In addition to the pleadings, answers to interrogatories, excerpts from

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[1] A motion to correct the petitioner's title to administrator was not acted upon by the District Court.

[2] The names of these defendants, and their positions at the Bridgewater State Hospital at the time the action arose, are: James Gilligan, M.D., Medical Director; Robert A. Fein, Ph.D., Deputy Medical Director; and Dennis F. Koson, M.D., Assistant Medical Director. The state defendants are referred to collectively as the Bridgewater defendants.

[3] The names of the county officials are John L. Danehy, Michael E. McLaughlin, and S. Lester Ralph, all of whom were county commissioners when the conduct underlying this action took place. The remaining defendant county officials are John J. Buckley and Ralph J. Bens, who were respectively Sheriff of Middlesex County and Superintendent of Billerica when the conduct underlying this action occurred. These officials are collectively referred to as the county defendants.

deposition and exhibits thereto, the county defendants and the petitioner submitted affidavits in support of their cross motions for summary judgment. The petitioner's affidavit appears at Appendix C, p. A-31.

On May 10, 1985, the District Court allowed the defendants' motions for summary judgment and denied plaintiff's motions for partial summary judgment. The District Court allowed defendants' motions for summary judgment on the ground that defendants Middlesex County, the Sheriff of Middlesex County, the Middlesex County Commissioners, and the Superintendent of the Billerica House of Corrections were too remote from the decision to furlough Prendergast to be liable under 42 U.S.C. §1983. The District Court also found that the Medical Director of Bridgewater State Hospital and his two assistants did not deprive Patricia of any clearly established constitutional right under 42 U.S.C. §1983. Plaintiff appealed the District Court decision on the ground that the county defendants had exhibited deliberate indifference to their duty to protect Patricia to an extent sufficient to give rise to liability under 42 U.S.C. §1983, and as to the state officials on the ground that they had breached an affirmative duty to protect Patricia by failing or refusing to respond to the request of the sentencing court for aid in sentencing the individual who thereafter murdered Patricia and by failing to undertake any proceedings for the civil commitment of Patricia's assailant, the murderer, whom they knew had high potential for doing murderous harm to an identified victim, Patricia, and when one of the assistants had concluded that as a result of the prisoner's mental illness, a failure to hospitalize him in strict security was likely to cause severe harm to Patricia, the statutory criteria for the civil commitment; and on the ground that the above-mentioned defendants were not too removed from the murder of Patricia to be liable under the provisions of 42 U.S.C. §1983.

The Court of Appeals affirmed the District Court decision on the ground that plaintiff had failed to state a cognizable claim under 42 U.S.C. §1983.

B. *Statement of Facts*

At the time of her death on December 20, 1979, Patricia was twenty-four years of age. (A-31). During late 1978 through mid-1979, Bradford Prendergast (Prendergast) had assaulted and threatened Patricia many times. Prendergast's assaults were accompanied by bizarre conduct,[4] and Patricia and her family came to the conclusion that Prendergast constituted a serious danger to her life. (A-32). Accordingly, Patricia sought to have Prendergast taken into custody. (A-32). She made complaints to the Police Departments in the towns where she lived and worked, and to the Clerks of Courts, seeking issuance of criminal complaints and restraining orders against Prendergast. (A-32).

As a result of these efforts, on July 2, 1979, the Norfolk County, Massachusetts District Attorney charged Prendergast with threatening Patricia's life, in violation of Mass. Ann. Laws ch. 275, §§2-5. (A-2). On July 12, 1979, Prendergast was arraigned in the District Court and, presumably because of his suicide attempt immediately following his most recent threat to kill Patricia, was ordered hospitalized at Bridgewater for observation and examination to determine whether he was competent to stand trial pursuant to Mass. Ann. Laws ch. 123, §15(a). (*Id.*).

A Bridgewater psychiatrist reported to the District Court that Prendergast was competent. (A-2). The defendant Fein advised the Court that "Mr. Prendergast's recent medical history suggests he is an individual with high potential of doing serious if not murderous harm to at least one potential victim [Patricia] and to himself" (A-3), and that, based upon his (Fein's) active participation in Prendergast's treatment during the latter's two month self-commitment at McLean Hospital from February through April, 1979, Fein had formed

[4] One example of this bizarre conduct occurred when Prendergast appeared one day outside the bank where Patricia worked, slashed his wrists, and smeared his blood on the glass doors by rubbing his wrists against them.

the opinion that Prendergast was "mentally ill" and that failure to hospitalize [Prendergast] in strict security would constitute a likelihood of serious harm to himself as well as others." (A-3).

On August 20, 1979, Prendergast was returned to the District Court, admitted to facts sufficient to warrant a finding of guilt and was sent back to Bridgewater for an examination to aid the Court in sentencing. Mass. Ann. Laws ch. 123, §15(e) (A-3). Prendergast remained at Bridgewater for a total of 79 days between the date of his arraignment in July, 1979, and his final sentencing in September, 1979. (A-3, A-5).

The head of the Forensic Unit at Bridgewater assigned the pre-sentence evaluation to the defendant Koson, identifying the case as a "Tarasoff case," which Koson understood to mean a case involving a psychotherapist's duty to warn an identified victim. (A-4).

During the time that Prendergast was held at Bridgewater for pre-sentence evaluation, Koson spoke briefly with him on two occasions. Koson reviewed Prendergast's Bridgewater file which contained a record of Prendergast's prior hospitalization, an account of his history of bizarre and threatening conduct and an account of his rehearsed plan to kidnap and murder Patricia. (A-4, A-5). At the request of the Assistant District Attorney who had prosecuted Prendergast in the District Court, Koson met with Fein and the Assistant District Attorney who urged that a petition for Prendergast's commitment to the state hospital for mentally ill persons requiring strict security be initiated. (A-4). At the meeting, Koson was given an affidavit from Patricia and a threatening letter Prendergast had written to Patricia from Bridgewater on August 3, 1979. (A-4).

On September 27, 1979, Koson wrote to the District Court that he was unable to render an opinion whether Prendergast was mentally ill or in need of commitment because Prendergast refused to cooperate with an examination. (A-4). In his

report to the Court, Koson volunteered the information that he had found no evidence to suggest that Prendergast was depressed or mentally ill. (A-5). Koson further stated he had reviewed Prendergast's record "extensively" (*Id.*). Koson made no mention of Patricia or of any danger to Patricia despite the "Tarasoff" description of the case and his awareness that the identified victim was Patricia, but rather stated (erroneously) that Prendergast had resumed his relationship with his wife. (*Id.*). Prendergast was returned to the Stoughton District Court without any petition for his commitment to Bridgewater and was sentenced to be incarcerated at the Billerica House of Correction for a period of six months, the maximum sentence under the statute. (A-8).

Sometime prior to November 20, 1979, Prendergast petitioned for parole from Billerica (A-5, A-6). On or about November 30, 1979, the county commissioners, who sat as the parole board for county prisoners, received a letter from the Chief Probation Officer, Stoughton District Court, recommending, and quoting from Fein's report, that parole be denied because Prendergast posed a serious life-threatening danger to one known person, Patricia, and the sentencing judge concurred with the recommendation. (A-6). The county commissioners denied Prendergast's parole petition on December 7, 1979. (A-7).

The letter from the Chief Probation Officer which formed the basis for the denial of parole was mailed to and received by the Billerica House of Correction prior to December 19, 1979. (A-7). Nevertheless, Prendergast was determined to be eligible for furlough and was released on furlough on December 19, 1979 despite his several prior violent suicide attempts or self-mutilations, despite his having twice been committed to Bridgewater, despite his having spent several months as an in-patient in a psychiatric hospital, despite his refusal to permit review of his psychiatric records by Billerica officials, and despite the Chief Probation Officer's letter being known to the

county commissioners and in the possession of Billerica. (A-7, A-8). On December 20, 1979, within 24 hours of his release on furlough, Prendergast assaulted Patricia and members of her family and then kidnapped and murdered Patricia. (A-8).

Reasons for Granting the Writ

THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE THIRD, FOURTH, AND ELEVENTH CIRCUITS.

The First Circuit has concluded that neither the state nor county defendants had any affirmative duty to protect Patricia Gilmore from attack despite the fact that Prendergast, a prisoner of the county, was known by these same officials to have planned and rehearsed the kidnap and murder of Patricia.

In *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), the Court stated that the parameters of the security of interests protected by the Fourteenth Amendment "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577.

It is likely that there is no more explicitly defined right in the Constitution of the Commonwealth of Massachusetts than the right of the citizen to be protected in safety by his government.

The Preamble of the Constitution of the Commonwealth of Massachusetts states:

> The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in

safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, to agree upon, ordain and establish the following Declaration of Rights, and Frame of Government, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.

Part I of the Constitution is entitled "A Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts."

Article V states:

All power residing originally in the people, and being derived from them, the several magistrates and officers of

> government, vested with authority, whether legislative, executive or judicial, are their substitutes and agents, and are at all times accountable to them.

Article VII states:

> Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

Article X states in part:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and prosperity, according to standing laws.

It was emphatically and explicitly the duty of these defendants to protect Patricia under the state constitution; it was Patricia's entitlement to protection, her right to life, the wellspring of all other rights, liberties and interests, which is constitutionally cognizable.

In *Martinez* v. *California*, 444 U.S. 277 (1980), the Court held that a state parole board was not liable under 42 U.S.C. §1983 where a parolee tortured and killed a random victim five months after being paroled. The parole board was not aware that the victim, as distinguished from the public at large, faced any special danger. *Martinez*, 444 U.S. at 285. In contrast, in the instant case, at least some of the defendants had actual knowledge that Prendergast had identified Patricia as his victim. Prendergast was incarcerated for threatening Patricia; he had disclosed planning her kidnap and murder, and at least Fein and Koson knew so. The county commissioners had actual knowledge that Prendergast posed a life threatening danger to an identified victim, Patricia.

The court in *Martinez* specifically stated: "We...do not decide that a parole officer could ever be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole," 444 U.S. at 285. Precisely those factors in *Martinez* which made the actions of the parolee there a remote and unpredictable result are, in this case, reversed; a known and identified victim is killed within 24 hours of release by an individual who remained in custody of the State while on furlough.

The First Circuit decision acknowledged that the Courts of Appeals for the Third, Fourth, and Eleventh Circuits have "held or suggested that a state defendant's knowledge that a third party poses a special danger to an identified victim will alone support a claim for relief under section 1983". (A-15). The Third Circuit held that where a plausible nexus exists between the policy or established procedure and the infringement of constitutional rights a §1983 action may be maintained. *Estate of Bailey* v. *County of York*, 768 F.2d 503, 507 (3d Cir. 1985). In that case, plaintiffs alleged that the county followed defective policies and procedures in investigating a child abuse case, thereby failing to prevent the victim's murder through child abuse. The Third Circuit found that a right to affirmative protection existed where it was possible to predict a specific victim notwithstanding the fact that the child was in the custody of her mother and not in the custody of the state at the time of the child's death.

In *Jones* v. *Phyfer*, 761 F.2d 642 (11th Cir. 1985), an elderly woman was raped in her home by a neighbor who was on furlough after being convicted and imprisoned for breaking into and entering her home. The court stated that an action under 42 U.S.C. §1983 is proper when there is some showing that the victim, as distinguished from the public at large, faced a special danger from the criminal, but the court concluded that, in that case, a special relationship did not exist between plaintiff and her attacker because the state had no

reason to know of the prisoner's intentions. In the present case, however, the defendants were expressly informed of the prisoner's intention to kidnap and kill Patricia. 761 F.2d at 644-645.

In *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied* 105 S.Ct. 1754, __ U.S. __ (1985), the Fourth Circuit held that there was potentially a special relationship sufficient to establish state action in violation of the victim's Fourteenth Amendment rights, actionable under 42 U.S.C. §1983, where state officials knew that two children were victims of abuse by specific parties but failed to follow procedures capable of preventing the children's deaths. The Fourth Circuit affirmed dismissal of the complaint on other grounds.

The Fourth Circuit has suggested certain factors which serve to establish the existence of a special relationship, all of which are met in this case. One factor is whether the victim or the perpetrator was in legal custody at the time of the injury or prior to the injury. *Jensen*, 747 F.2d at 194, n.11. Prendergast remained in custody as a matter of state law when he kidnapped and murdered Patricia while on a weekend furlough. M.G.L. c. 127, §90A.

The second factor is whether the state has undertaken expressly to provide affirmative protection to a specific person or class. The existence of the state correctional systems and the state hospital for those mentally ill persons in need of strict security is a manifestation of the state's undertaking to protect the citizenry in general and Patricia in particular from Prendergast by incarcerating Prendergast for the assaults and threats he had made on Patricia's life.

The third factor is whether the state knew of plaintiff's plight. *Jensen*, 747 F.2d at 194-195, n.11. It is undisputed that defendants Fein, Koson, Ralph, Danehy and McLaughlin had actual knowledge that Prendergast had threatened and assaulted Patricia, an identified victim. It is indisputable that all the defendants knew or had the duty and the clear oppor-

tunity to discover, from information readily available, that Prendergast continued to plan and had practiced Patricia's kidnap and murder. Thus the county and State knew that Patricia continued to be subject to a specific danger from Prendergast on the date he was furloughed and thereby given an unimpeded opportunity to carry out his plan.

The Seventh Circuit has stated that

> (i)f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit. *Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

To the extent these defendants put Patricia in a position of danger by releasing Prendergast on furlough, they are as much active tortfeasors as if they had thrown Patricia into the pit.

In *Beck* v. *Kansas University Psychiatry Foundation*, 580 F. Supp. 527, 534 (D. Kan. 1984), the district court found state action in violation of 42 U.S.C. §1983 where the state negligently released a prisoner when the state officials knew or reasonably should have known of the special danger which the prisoner posed toward specific individuals. State officials had control over the prisoner; by releasing him knowing of his potential for violence towards persons employed at a specific location, state officials violated a duty of protection imposed upon them. 580 F. Supp. at 534.

The court in *Beck* stated that where the assailant is not an agent *per se* of the state, his actions can still be attributed to the state when the state knows or has reason to know of a special danger to a specific person as distinguished from the public at large. 580 F. Supp. at 533, 534. The length of time between the release of the criminal and the action taken by him is relevant to the question of state action. In *Beck*, the time lapse between the killer's release and the murders was two weeks. In the instant case Prendergast killed Patricia within 24 hours of his release on furlough.

Starkly drawn, the question raised by this petition is whether state and county officials in positions of high executive authority in state and county correctional systems may ignore the announced fatal consequences of their indifference to the plight of an identified victim. As the Third, Fourth, and Eleventh Circuits have recognized, there is a point in the compact between the people and the government where no other duty toward the people has any meaning if the government does not act reasonably to protect the people from known, predicted, identified and particularized murderous violence. The petitioner urges this Court to establish that point left open in *Martinez* and thereby bring into harmony the conflict among the Circuits.

Conclusion

The Court of Appeals for the First Circuit has interpreted the state action requirement of 42 U.S.C. §1983 contrary to the interpretations adopted by three other Circuits, thereby denying a cause of action to petitioner and to other parties injured through state officials' failures to protect identified potential victims from preventable injury and death at the hands of individuals committed to their custody. The issue set forth in this appeal is important and controversial, and should be resolved authoritatively and uniformly by this Court.

Respectfully submitted,

KIERAN B. MEAGHER*
ROBERT J. OWENS
ROBERT D. CITY
ROBERT J. OWENS ASSOCIATES, P.C.
Fifty Congress Street
Boston, Massachusetts 02109
Telephone: (617) 523-3050

* Counsel of Record

Dated: June 30, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 85-1439

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
PLAINTIFF, APPELLANT,

v.

JOHN J. BUCKLEY, et al.,
DEFENDANTS, APPELLEES.

Kieran B. Meagher with whom *Robert J. Owens*, *Robert D. City* and *Robert J. Owens Associates, P.C.*, Boston, Mass., were on brief for appellant.

Peter A. Biagetti with whom *Thomas R. Murtagh* and *Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, Boston, Mass., were on brief for appellees County of Middlesex and John L. Danehy.

Edward E. Kelly and *Barron & Stadfeld*, Boston, Mass., on brief for appellees S. Lester Ralph and Michael E. McLaughlin.

Cynthia J. Cohen and *Meehan, Boyle & Cohen, P.C.*, Boston, Mass., on brief for appellee John J. Buckley.

Roberta Thomas Brown with whom *Francis X. Bellotti, Atty. Gen.*, and *Paula J. DeGiacomo, Asst. Atty. Gen.*, Boston, Mass., were on brief for appellees James Gilligan, Robert A. Fein and Dennis F. Koson.

Lee Carl Bromberg, *Benjamin J. Naitove* and *Bromberg, Sunstein & McGregor*, Boston, Mass., on brief for appellee Ralph J. Bens.

Argued Nov. 12, 1985
Decided March 31, 1986

Before CAMPBELL, *Chief Judge*, BREYER, *Circuit Judge*, and WYZANSKI,* *Senior District Judge*.

LEVIN H. CAMPBELL, *Chief Judge*.

On December 20, 1979, Patricia Gilmore was murdered by Bradford Prendergast, a Billerica House of Correction inmate, while Prendergast was on leave from the House of Correction on a two-day furlough. Plaintiff-appellant Joseph P. Gilmore, administrator of the estate of Patricia Gilmore, brought this

* Of the District of Massachusetts, sitting by designation.

civil rights action under 42 U.S.C. § 1983 (1982) in the United States District Court for the District of Massachusetts against defendants-appellees Middlesex County, the Middlesex County Commissioners, the Sheriff of Middlesex County, the Superintendent of the Billerica House of Correction, and the Medical Director and two assistants at Bridgewater State Hospital. The complaint alleges that various acts and omissions of the defendants proximately caused Gilmore's murder by Prendergast, depriving her of life without due process of law in violation of the fourteenth amendment. The complaint further alleges that the defendants are liable for Gilmore's death under state tort law. Upon cross-motions for summary judgment, the district court awarded summary judgment to the defendants on the section 1983 claims, and declined to exercise jurisdiction over the pendent state law claims. *Estate of Gilmore* v. *Buckley*, 608 F.Supp. 554 (D. Mass. 1985). We affirm.

I.

The relevant facts, essentially undisputed, may be summarized as follows. On July 2, 1979, acting on a criminal complaint filed by Patricia Gilmore, the Norfolk County District Attorney charged Bradford Prendergast with threatening her life in violation of Mass. Gen. Laws ch. 275, § 2 (1984).[1] On July 12, Prendergast was arraigned in Stoughton District Court and ordered hospitalized at Bridgewater State Hospital for observation and an evaluation of his competency to stand trial. On August 15, 1979, Dr. Anneliese A. Pontius, a Bridgewater psychiatrist, reported to the court that Prendergast was "not suffering from any major mental illness" and that he was "competent to stand trial."

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[1] Chapter 275, section 2, provides,

Complaint of threat to commit crime

If complaint is made to any such court or justice that a person has threatened to commit a crime against the person or property of another, such court or justice shall examine the complainant and any witnesses who may be produced, on oath, reduce the complaint to writing and cause it to be subscribed by the complainant.

Shortly thereafter, on August 17, 1979, defendant Dr. Robert A. Fein, a clinical and forensic psychologist at Bridgewater, filed a superseding report with the court concluding that, "based on additional information," Prendergast was "mentally ill" and that "failure to hospitalize [him] in strict security would constitute a likelihood of serious harm to himself as well as others." The "additional information" referred to by Fein was a medical report on Prendergast from McLean Hospital in Belmont, Massachusetts, where Prendergast had voluntarily committed himself between February and April of 1979, and been treated by Fein and others. Elsewhere in his report to the court, Fein suggested that "Prendergast's recent medical history indicates that he is an individual with high potential for doing serious, if not murderous, harm to at least one potential victim [Gilmore] and to himself." Fein recommended that, if found guilty, Prendergast be returned to Bridgewater for further hospitalization and recommendations.

On August 20, 1979, Prendergast was found guilty of threatening Patricia Gilmore under Mass. Gen. Laws ch. 275, § 2, and returned to Bridgewater to aid the court in sentencing pursuant to Mass. Gen. Laws ch. 123, § 15(e) (1984).[2] In a note dated September 11 to Dr. Park Dietz, the director of forensic psychiatry at Bridgewater, Fein suggested that Dietz assign "someone senior" to do the 15(e) evaluation of Prendergast,

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[2] Chapter 123, section 15(e), provides,

> After a finding of guilty on a criminal charge, and prior to sentencing, the court may order a psychiatric or other clinical examination and, after such examination, it may also order a period of observation in a facility or at the Bridgewater state hospital if the court determines that strict security is required and if such person is a male. The purpose of such observation or examination shall be to aid the court in sentencing. Such period of observation or examination shall not exceed forty days. During such period of observation, the superintendent or medical director may petition the court for commitment of such person. The court may hear the petition . . . , and if the court makes the necessary findings, it may in its discretion commit the person to a facility or the Bridgewater state hospital. Such order of commitment shall be valid for a period of six months . . . .

because Prendergast was "paranoid about [Fein] enough already." Dietz assigned Dr. Dennis Koson, a forensic psychiatrist who had recently joined the staff at Bridgewater after working for the Michigan Department of Corrections, to do the 15(e) evaluation. Dietz informed Koson that Prendergast was a "Tarasoff case,"[3] and advised Koson to speak with Dr. Fein for further details. Koson met with Fein and reviewed Prendergast's Bridgewater file, which contained an abstract of his McLean record. Koson also met briefly with Prendergast on two occasions, but Prendergast refused to submit to an examination. Finally, Koson attended a conference with Fein and an assistant district attorney, at which the district attorney informed Koson of his desire to have Prendergast committed to Bridgewater under section 15(e), and furnished Koson with an affidavit from Patricia Gilmore detailing the history of her relationship with Prendergast and his threatening behavior.

On September 28, 1979, Koson reported to the court as follows:

> Mr. Prendergast, having been found guilty on a charge of threats, and committed to Bridgewater State Hospital pursuant to MGL 123, Section 15(e), for psychiatric examination.
>
> While I have extensively reviewed his record from the past, Mr. Prendergast, with or without the advice of counsel, refused to cooperate with an examination. I am, thus, unable to render an opinion on whether or not he is

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[3] Tatiana Tarasoff was murdered by Prosenjit Poddar two months after Poddar allegedly confided his intention to kill her to a psychologist employed by the University of California. *Tarasoff* v. *Regents of the University of California*, 17 Cal.3d 425, 551 P.2d 334, 131 Cal.Rptr. 14 (1976) (in bank). The Supreme Court of California held that, under California law, a psychotherapist who determines, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.

> mentally ill or in need of commitment, although it must be said in my several brief conversations with him, I found no evidence either from my observations at the time or from his current institutional record to suggest that he might be depressed or mentally ill.
>
> I feel strictly from his psychiatric record that he needs ongoing psychotherapy and strongly suggest that if he receives a sentence in this matter that ongoing treatment and monitoring of his relationship with his wife which he resumed be made a strict condition of that sentence.[4]
>
> While I am unable to provide definitive statements based on his psychiatric examination, I would be more than happy to discuss any aspect of his case, his psychiatric history, and conditions under which his need for psycotherapy might be optimally met.

At his deposition, Koson testified that he considered the various opinions and impressions contained in the McLean record and Prendergast's Bridgewater file to be in conflict and that, without an examination, he believed it would have been both unlawful and unethical to recommend that Prendergast be committed.

Prendergast was discharged from Bridgewater on September 28, 1979, and sentenced to six months' incarceration at the Billerica House of Correction. On October 18, Steven Alari, a counselor at Billerica who had worked with Prendergast in a department store some seven or eight years previously, filled out an application on Prendergast's behalf for jail credits for the time that Prendergast had spent at Bridgewater. Towards the end of October, Prendergast asked Alfred Donovan, a "crisis intervention worker" at Billerica, to submit his parole application to the Middlesex County Commissioners, who sat

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[4] Koson testified that both Prendergast and Dr. Fein had informed him that Prendergast had resumed his relationship with his estranged wife. In fact, it appears that Prendergast had not resumed a relationship with his wife.

as the county parole board. In early November, Prendergast was granted 58 days of jail credit for part of the time he spent at Bridgewater, and his institutional discharge date was moved up from March 10 to January 12, 1980.

On November 5, 1979, the prisoner "classification" or "contract board" at Billerica reviewed the intake record on Prendergast. The intake worker who was handling Prendergast's case informed the contract board of Prendergast's prior hospitalization at McLean and Bridgewater and that, in addition to the charge of threats for which he was currently incarcerated, there were three other incidents of threatening or harassing behavior on his probation records. However, the contract board was not able to obtain Prendergast's McLean or Bridgewater records, because he refused to consent to their release. Furthermore, the intake worker informed the contract board that she had been unable to obtain any information concerning Prendergast from the Stoughton District Court, because Prendergast had never been assigned a probation officer. Based on the information before it, the contract board deemed Prendergast eligible for furlough.[5]

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[5] The furlough program at Billerica was instituted in 1972 pursuant to Mass.Gen.Laws ch. 127, § 90A (1984), which authorizes the temporary release of "committed offender[s] under prescribed conditions." The Department of Corrections regulations implementing the statute provided that "[t]he facility administrator shall develop a written procedure for reviewing applications for furlough for those inmates eligible for furlough. . . ." Mass. Admin. Code tit. 103, § 946.05 (1979).

In turn, the "General Guidelines Governing Furlough" in effect at Billerica during the period in question provided in pertinent part that "[t]he decision to grant a resident a furlough as part of his classification plan" was to be based on a consideration of the following factors: offense, institutional performance, resident's ability to conduct himself responsibly while in the community, prior furlough histroy, past history of escapes, length of sentence, cases pending and/or warrants, judgment whether the resident can be trusted to return at the designated time and not commit any criminal acts while on furlough, the need for community reintegration, and ability to obtain an acceptable furlough sponsor.

On November 7, 1979, the contract board assigned Diane Levesque to be Prendergast's counselor, and approved his application for a one-day furlough to be taken on November 22. On November 19, Prendergast's application for a 48-hour release furlough was granted for December 7-9. Prendergast completed both of these furloughs without incident.

On December 7, 1979, the Middlesex County Commissioners denied Prendergast's petition for parole on the basis of a report from Thomas Cavanaugh, the Chief Probation Officer of the Stoughton District Court. The Cavanaugh report, which was concurred in by a state district court justice, related the concerns which Dr. Fein had expressed to the court concerning Prendergast's recent medical history and likely dangerousness. The County Commissioners forwarded the parole file, which included the Cavanaugh report, to Billerica via interoffice mail.

On December 17, 1979, Prendergast's parole file was received at Billerica by Alfred Donovan, who was handling the processing of parole requests at the time. Donovan recorded the denial of Prendergast's parole and reported the contents of the Cavanaugh report to Steven Alari, who he mistakenly thought was Prendergast's counselor. The Cavanaugh report was not brought to the attention of anyone else at Billerica.[6]

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[6] The General Guidelines Governing Furlough in effect at Billerica provided,

> CANCELLATION OF FURLOUGH
>
> Any officer or employee of the Sheriff's Department who receives any information which may affect the release of a resident already approved for a furlough shall bring such information immediately to the attention of the Master, and the furlough supervisor, or other person in charge of the House of Correction when the Master is not present at the facility. The Master. furlough supervisor or person in charge shall take appropriate steps to insure that under no circumstances shall the resident be released from the facility until the matter in question is resolved. Steps shall include, but not be limited to, immediate notification of outer control personnel not to allow the resident to be released.

This provision apparently required Donovan and Alari to notify their superiors of the Cavanaugh report; it is unclear, however, whether either Donovan or Alari knew that Prendergast had already applied and been approved for his third furlough at the time the report was received.

In late November or early December, Prendergast received an additional 21 days of jail credit for the remainder of the time he spent at Bridgewater prior to sentencing, and his institutional discharge date was moved up to December 22, 1979. Prendergast's third furlough was approved for a 48-hour period running from December 19-21. Prendergast was released on furlough on December 19, 1979, and the following day he kidnapped and murdered Patricia Gilmore.

II.

The district court granted summary judgment in favor of the defendants on plaintiff's section 1983 claims. The court held that the undisputed facts, even when viewed most favorably to the plaintiff, did not make out a case under section 1983. On appeal we likewise conclude that plaintiff has failed to make out a basis for recovery under section 1983.

The underlying question is whether the failure of state psychiatrists, county prison officials and other county employees to protect Patricia Gilmore from attack by a private third party is actionable under 42 U.S.C. § 1983 (1982).[7] For there to be a cause of action under section 1983, the state defendants must have deprived the plaintiff of a right "secured by the Constitution and laws" of the United States. It is argued here, as it has been in other cases, that the state defendants, by reason of

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[7] Section 1983 provides in pertinent part,

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

As the language of the statute indicates, section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3, 99 S.Ct. 2689, 2694, n.3, 61 L.Ed.2d 433 (1979).

their inept failure to secure Prendergast and provide adequate safeguards for his announced victim, deprived the victim of her right secured by the fourteenth amendment not to be deprived of life without due process of law. The fourteenth amendment, however, does not protect against the deprivation of life *by any person at all,* but only against the deprivation of life *by the state* without due process.[8] Where, as in these circumstances, the victim dies at the hands of a private individual who was neither an agent of the state nor employed by the state, can it be said that *the state* deprived her of life without due process? If not, there was no violation of the fourteenth amendment, even though the failure of state officials to protect the victim contributed to her death.

A growing number of courts, including the Supreme Court in *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), have wrestled with this issue in analogous situations, answering the question whether there has been constitutional violation with, for the most part, a qualified "no."[9] The situation in the case at bar differs markedly from that where the state defendants themselves kill the victim—as when a police officer wrongfully shoots someone, thus implicating the state directly in the taking of the victim's life. *See, e.g., Kibbe* v. *City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, ____U.S.____, 106 S.Ct. 1374, 88 L.Ed.2d ____ (1986).

In *Martinez*, the victim was tortured and murdered by a parolee, who had previously been convicted of attempted rape, five months after the parolee was released from prison. A

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[8] Section 1 of the fourteenth amendment provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[9] *See, e.g., Jones* v. *Phyfer*, 761 F.2d 642 (11th Cir. 1985); *Jackson* v. *Byrne*, 738 F.2d 1443 (7th Cir. 1984); *Jackson* v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984); *Fox* v. *Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers* v. *DeVito*, 686 F.2d 616 (7th Cir. 1982).

section 1983 action was brought against the state officials responsible for his release. In denying relief, Justice Stevens wrote for a unanimous Court,

> Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "*State* ... of life ... without due process of law." Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, ... we hold that, taking these particular allegations as true, appellees [*viz*, the state defendants] did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.
>
> Her life was taken by the parolee five months after his release.[10] He was in no sense an agent of the parole board.

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[10] Compare the facts in *Screws* v. *United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), where local law enforcement officials themselves beat a citzen to death.

444 U.S. at 284-85, 100 S.Ct. at 559 (citations omitted) (emphasis in original).

The reason a state's failure to provide adequate protection does not normally violate the due process clause was suggested by the Seventh Circuit in *Bowers* v. *DeVito*, 686 F.2d 616 (7th Cir. 1982). After emphasizing that section 1983 imposes liability only if there is a deprivation of a constitutional right, the court stated,

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law.... But there is no constitutional right to be protected by the

> state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

686 F.2d at 618 (citation omitted). This, we agree, is the nub of the issue.[10] To accept plaintiff's thesis that the various alleged errors by state psychiatrists, and by county officials and employees that resulted in Prendergast's release on furlough, violated the fourteenth amendment would require us to hold that the fourteenth amendment not only protects against the misuse of force by the state, but directs the state to protect its citizens against the violence of others. Nothing in the fourteenth amendment or its history, however, suggests that it was written to provide an expansive guarantee of state protective services.

It would seem from what we have just said that we should affirm without more. However, both the Supreme Court in *Martinez* and various circuit courts, including the Seventh Circuit, have indicated that in some special circumstances, where a state has assumed a "special custodial or other rela-

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[10] In so saying, we recognize certain special exceptions. *See* discussion *infra*. We also recognize that if state officers conspire with criminals or madmen or, intending to harm the victim, deliberately release a criminal or madman, *the state* might then be said to have deprived the victim of life, liberty, or property. But if state officials (absent "special circumstances," *infra*) do no more than act erroneously—even if the error is egregious—and the killer is not an officer of the state but is a private third party, we think the essential element of the state's having worked a deprivation is missing. In the present situation, what the state has done is fail to provide the victim protection—a failure which, though perhaps wrong in our view, is not a violation of the due process clause any more than is a fireman's nondeliberate error in failing to rescue someone from a burning building.

tionship" in respect of a particular person, the state's failure to protect that person might implicate the due process clause.[11] *Fox* v. *Custis*, 712 F.2d 84, 88 (4th Cir. 1983) (collecting cases). We must inquire, therefore, whether any such special circumstances exist here.

In the vast majority of cases which have found the existence of a "special relationship" between the state and the plaintiff giving rise to an affirmative duty of care or protection under the fourteenth amendment, the plaintiff has been in state custody or care at the time of the alleged injury. Thus, it has been held that the fourteenth amendment bars the states from acting with deliberate indifference towards the safety or welfare of prison inmates, *see, e.g., Estelle* v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (incorporating eighth amendment prohibition against "cruel and unusual punishments" against the state); *Miranda* v. *Munoz*, 770 F.2d 255 (1st Cir. 1985) (same), children in the custody and care of state social service agencies, *see e.g., Doe* v. *New York City Department of Social Services*, 709 F.2d 782 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983), and persons in the care of state hospitals, *see, e.g., Morrison* v. *Washington County*, 700 F.2d 678 (11th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

Generally speaking, all of these cases can be read for the proposition that, if the state takes a person into custody or otherwise assumes responsibility for that person's welfare, a "special relationship" may be created in respect of that person, and the fourteenth amendment imposes a concomitant duty on the state to assume some measure of responsibility for the person's safety and well-being. *See also Ellsworth* v. *City of Racine*, 774 F.2d 182 (7th Cir. 1985) (suggesting that munici-

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[11] There is no claim here that the defendants' failure to protect Gilmore deprived her of equal protection of the laws. *See e.g., Bowers* v. *DeVito*, 686 F.2d at 618; *Thurman* v. *City of Torrington*, 595 F.Supp. 1521 (D. Conn. 1984).

pality may assume a "special relationship" in respect of municipal employee by virtue of employment relationship, requiring municipality to provide police protection), *cert. denied*, ____U.S.____, 106 S.Ct. 1265, 88 L.Ed.2d ____ (1986).[12]

In *Martinez*, the Supreme Court gave only vague hints as to what circumstances, if any, might create such a special relationship and render the state liable for a parolee's crime. It emphasized that Thomas had killed his victim five months after his release, implying, perhaps, that the long lapse of time could have made some difference in its analysis. It also emphasized that "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Martinez*, 444 U.S. at 285, 100 S.Ct. at 559. Finally it said, "We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." *Id.* Beyond these remarks, the Court did not suggest what "special circumstances" limits there might be to its holding.

The above qualifications in *Martinez* do leave the door slightly ajar in the present case. Some of the instant defendants knew or should have known that Prendergast posed a special danger to Patricia Gilmore, as distinct from the public at large. Moreover, Gilmore was murdered but one day after Prendergast's release on furlough. In our view, however, whatever significance these factors may have as a matter of state tort law, they did not create a special relationship of constitutional dimension between the state and Gilmore. *See Beard* v. *O'Neal*, 728 F.2d 894 (7th Cir.) (fifth amendment due process clause did not impose affirmative duty on FBI informant to prevent police officer from murdering known victim), *cert. denied*, ____U.S.____, 105 S.Ct. 104, 83 L.Ed.2d 48 (1984).

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[12] In citing to these and other circuit cases which go beyond addressing the medical needs of prison inmates, *see Estelle* v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), we do not mean to signal our agreement (or disagreement) with the application of law made on the particular facts of each case.

It is argued that because at least some of the defendants knew or should have known that Prendergast posed a special danger to Patricia Gilmore, they had a constitutional duty to protect her. But irrespective of any knowledge the state defendants had of the special danger that Prendergast posed to Gilmore or the temporal proximity between Prendergast's release on furlough and Gilmore's murder, the state did nothing to render Gilmore any more or less capable of defending herself from a violent attacker than any other member of the general public. Furthermore, even though Prendergast was legally in state custody while on furlough,[13] Prendergast was in no sense an agent of the state. The state played no part in creating the threat that Prendergast posed to Gilmore, Prendergast's murderous design was independently conceived and executed, and the state neither condoned nor encouraged his behavior. *See Martinez*, 444 U.S. at 285, 100 S.Ct. at 559; *Estate of Bailey* v. *County of York*, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting); *Beard* v. *O'Neal*, 728 F.2d at 899; *Fox* v. *Custis*, 712 F.2d at 87 n.2.[14]

For there to be a special relationship implicating the fourteenth amendment, we believe the state must be more directly implicated than it was here in the events causing the victim's death—as, perhaps (although we need not decide), when the state, by exercising custody or control over the plaintiff, effectively strips her of her capacity to defend herself, or affirma-

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[13] Mass.Gen.Laws ch. 126, § 16 (1984), provides in part,

> The sheriff shall have custody and control of the jails in his county, . . . and of all prisoners committed thereto, and shall keep the same himself or by his deputy as jailer, superintendent or keeper, and shall be responsible for them. . . .

[14] We also note that the plaintiff has failed to cite any provisions of state law that either imposed a constitutionally cognizable duty on the defendants to protect Gilmore, or afforded her an entitlement to protection. Although Mass. Gen. Laws ch. 123, § 15(e) (1984), authorized the state defendants to petition for Prendergast's commitment, *see* note 2, *supra*, it did not require them to do so. *See Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

tively places her in a position of danger that she would not otherwise have been in. Here, the state and county defendants did not have custody or control over Gilmore, nor did they condone, ratify or in any way instigate Gilmore's homicidal encounter. *See, e.g., Jackson* v. *City of Joliet*, 715 F.2d 1200, 1204-05 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984). Because there was no special relationship of constitutional dimension between Gilmore and the state, we hold that the plaintiff has failed to make out a violation of the fourteenth amendment and a claim under section 1983.

We recognize that a few courts have held or suggested that a state defendant's knowledge that a third party poses a special danger to an identified victim will alone support a claim for relief under section 1983.[15] In our view, however, absent a clear federal statutory or constitutional mandate, the development of state and municipal tort liability in this area is best left to state courts and legislatures. *See Paul* v. *Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). We agree with Judge Adams's recent remarks that

> [section] 1983 was enacted to deal primarily with acts of discrimination by state officials. There is a danger that by extending this important legislation to contexts far removed from Congress' original and overarching purposes, a national state tort claims act administered in the

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[15] *See, e.g., Estate of Bailey* v. *County of York*, 768 F.2d 503 (3d Cir. 1985) (survivors of child murdered by her guardians stated a cause of action under section 1983 against state social service agency, although child was not in legal custody of the state, and child's guardians were not under state control or supervision); *Jones* v. *Phyfer*, 761 F.2d 642 (11th Cir. 1985) (where plaintiff was attacked by furloughed inmate, court suggested that it might have found a special relationship if plaintiff had alleged that defendants knew that she, as distinguished from the public at large, faced a special danger); *Beck* v. *Kansas University Psychiatry Foundation*, 580 F.Supp. 527 (D. Kan. 1984) (survivors of hospital employees murdered by inmate shortly after his release from state penitentiary stated a cause of action under section 1983 where prison authorities allegedly knew of special danger inmate posed to the decedents).

> federal courts in effect will be created. Steps in that direction should not be lightly taken since the ultimate outcome of such a course might well be incongruent with our role as federal judges. When a court extends a statute far beyond what was contemplated by Congress, it transgresses the separation of powers.

Estate of Bailey v. *County of York*, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting).

Enormous economic consequences could follow from the reading of the fourteenth amendment that plaintiff here urges. Firemen who have been alerted to a victim's peril but fail to take effective action; municipal ambulances which, when called, arrive late; and myriad other errors by state officials in providing protective services, could all be found to violate the Constitution. It would seem appropriate that the citizenry, acting though state legislatures and state courts, should determine how far it wishes to go in reimbursing claims of this type. We can see no justification for rewriting the due process clause of the federal Constitution so as to construct a basis for relief that can more flexibly be provided elsewhere, if that is deemed advisable.

III.

Because we conclude that the plaintiff has not stated a cause of action under section 1983, we need not address the defendants' argument that, following *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds*, *Daniels* v. *Williams*, ____U.S.____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Hudson* v. *Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the existence of an adequate remedy at state law precludes the plaintiff's claims. Nor need we express any view as to whether any of the individual defendants' conduct was less than reckless or grossly negligent, or whether they might be entitled to the defense of qualified immunity.

Of course, our opinion expresses no view on the merits of the plaintiff's claims under the tort law of Massachusetts or any other state.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA No. 80-1749-T

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
PLAINTIFF

v.

JOHN J. BUCKLEY, et al.,
DEFENDANTS

ORDER

TAURO, D.J. May 10, 1985

For the reasons stated in the accompanying memorandum, defendants' motions for summary judgment are allowed and plaintiff's motion for partial summary judgment is denied. Judgment is entered for the defendants.

It is so ordered.

s/ J.L. TAURO
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA No. 80-1749-T

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
PLAINTIFF

v.

JOHN J. BUCKLEY, et al.,
DEFENDANTS

MEMORANDUM

TAURO, D.J. May 10, 1985

Patricia Gilmore was murdered by Bradford Prendergast on December 20, 1979, while Prendergast was on furlough from the Billerica Jail and House of Correction ("Billerica"). Gilmore's estate has brought this civil rights action[1] against Middlesex County, the Sheriff of Middlesex County, the Middlesex County Commissioners, and the Superintendent of Billerica ("county defendants"), as well as the medical director and two assistants at Bridgewater State Hospital ("Bridgewater defendants"). The case is before the court on the parties' cross motions for summary judgment.

[1] Plaintiff's complaint is grounded on alleged violations of state tort law and 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

I.

The Facts

On July 2, 1979, a warrant was issued for the arrest of Bradford Prendergast based on Patricia Gilmore's complaint that Prendergast had threatened her life. Prendergast was arraigned in Stoughton District Court on July 12, 1979. He was ordered hospitalized at Bridgewater State Hospital for observation and examination to determine his competency to stand trial. Dr. Anneliese A. Pontius, a Bridgewater psychiatrist, conducted the competency evaluation and reported to the court on August 15 that Prendergast was not suffering from any major mental illness and was competent to stand trial.

Two days later, August 17, defendant Dr. Robert A. Fein, a clinical and forensic psychologist at Bridgewater, reported to the court that, based on additional information, he had concluded that Prendergast was mentally ill and that failure to hospitalize him in strict security would constitute a likelihood of serious harm to himself and others. The "additional information" was the medical record from McClean Hospital, where Prendergast had been treated (by Fein, among others) between February and April 1979. Fein concluded that "Prendergast's recent medical history indicates that he is an individual with high potential for doing serious, if not murderous, harm to at least one potential victim and to himself." He recommended that Prendergast, if found guilty, be returned to Bridgewater for further hospitalization. Fein concluded that "our opinion at the present time is that Mr. Prendergast should be committed to Bridgewater State Hospital."

On August 20, 1979, Prendergast was found guilty of making threats in violation of Mass. Gen. Laws ch. 275, § 2 and was returned to Bridgewater to aid the court in sentencing, pursuant to Mass. Gen. Laws ch. 123, § 15(e). In a note to Dr. Park Dietz, head of forensic unit at Bridgewater, Fein requested that Dietz assign a "senior person" to do the 15(e) evaluation

because Prendergast was "paranoid about me enough already." Dietz assigned defendant Dr. Dennis Koson, a forensic psychiatrist, to do the 15(e) evaluation. Dietz characterized Prendergast as a "Tarasoff case" and suggested that Koson talk to Dr. Fein for further details. Koson met with Fein, attended a conference with Fein and the district attorney, met with Prendergast twice, and reviewed his Bridgewater file which contained an abstract of his McClean record.

Koson reported to the court on September 28, 1979 that, because Prendergast refused to assent to an examination, he was unable to render the opinion requested by the court. Koson, however, went on to volunteer, "I found no evidence either from my observations at the time or from his current institutional record to suggest that he might be depressed or mentally ill." But Koson added that, based on his review of the psychiatric record, Prendergast needed ongoing psychotherapy. Koson considered the opinions and impressions contained in the McClean record to be in conflict and believed that, without an examination, it would have been unethical and irresponsible to render an opinion as to whether Prendergast was dangerous as a result of mental illness.

Prendergast was discharged from Bridgewater on September 28, 1979 and sentenced to six months incarceration at Billerica. In early November, Prendergast was granted 58 days of jail credit for part of the time he spent at Bridgewater. His institutional discharge date, therefore, was moved up to January 12, 1980.

On November 5, 1979, the Billerica prisoner classification or "contract" board reviewed the intake information on Prendergast (which did not include his Bridgewater or McClean records) and deemed him eligible for furlough. Two days later, November 7, Prendergast's application for a one-day furlough was approved for November 22. On November 19, his application for a two-day work release furlough was approved to begin December 7. Prendergast completed both furloughs without incident.

Prendergast had also applied for parole to the Middlesex County Commissioners, who sat as the county parole board. The board denied his application on December 7, based on a letter from Thomas Cavanaugh, Chief Probation Officer of the Stoughton District Court, reporting Dr. Fein's concern about Prendergast's medical history and likely dangerousness.

The parole file, including the Cavanaugh letter, was sent to Billerica. Albert Donovan, a "crisis-intervention worker" who processed Prendergast's parole application, received the file on December 17. Donovan read the Cavanaugh letter to a person whom he mistakenly thought was Prendergast's counselor. The Cavanaugh information was not brought to the attention of anyone else at Billerica.

Prendergast's institutional discharge date had been moved up to December 22, 1979, based on his receipt of additional jail credits, and his third furlough was approved for December 19-20. Prendergast was released on furlough on December 19. The next day he kidnapped and murdered Patricia Gilmore.

II.

The § 1983 Claim

In determining whether the defendants here may be held liable under 42 U.S.C. § 1983 for Gilmore's murder, initial inquiry, as in any § 1983 case, must focus on two threshold issues: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981).

The first element raises the issue of whether there is a sufficient causal connection between defendant's acts and Gilmore's death such that the state fairly may be held responsible for it.[2]

[2] The "state action" requirement "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). In a civil rights action against a state official, the under-color-of-state-law requirement of § 1983 and the "state action" requirement of the Fourteenth Amendment are identical. *Id.* at 929.

This issue is closely related to the question raised by the second element: whether the defendant officials had an affirmative constitutional duty to protect Gilmore from Prendergast. *Cf. Palsgraf* v. *Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928) (analyzing "proximate cause" issues in terms of scope of legal duty).

Plaintiff argues that the Due Process clause of the Fourteenth Amendment imposed a duty upon the defendants that they failed to meet. Specifically, plaintiff maintains that the county defendants failed to prevent Prendergast's release, or warn Gilmore, despite the fact that they or their subordinates knew or should have known of the danger Prendergast posed to her. These failures, plaintiff argues, deprived Gilmore of her life without due process of law. Plaintiff contends that the Bridgewater defendants also deprived Gilmore of her life without due process by failing to institute civil commitment proceedings against Prendergast when they knew or should have known that, as a result of his mental illness, a failure to hospitalize him was likely to cause serious harm to Gilmore.

In *Martinez* v. *California*, 444 U.S. 277 (1980), the Supreme Court held that a state parole board could not be held liable under § 1983 for paroling a known sex offender who subsequently tortured and murdered a 15-year-old girl, even if the board knew that such a crime was likely to occur and even if the board owed a duty to the girl under state tort law. The Court stated:

> Although the decision to release Thomas from prison was action taken by the State, the action of Thomas five months later cannot be fairly characterized as state action.

444 U.S. at 284-85.

The Court left open the possibility that there might be circumstances under which a parole official could be deemed to have "deprived" someone of life by action taken in connection with the release of a prisoner. But the Court emphasized that in the circumstances of *Martinez*, "decedent's death is too

remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.* at 285. Those circumstances included the fact that the murder occurred five months after the release, the murderer was not an agent of the state, and the parole board was not aware that the decedent, as distinguished from the public at large, faced any special danger.

Plaintiff attempts to distinguish *Martinez* on the ground that the defendants knew or should have known that Prendergast posed a special danger to Gilmore. Indeed, courts have held that, while a state has no affirmative constitutional duty to protect the general public from criminal attack, a duty of protection may arise with respect to particular persons who have a "special relationship" with the state. *See Fox* v. *Custis*, 712 F.2d 84, 88 (4th Cir. 1983); *Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Such special relationships typically involve persons within state custody—for example, prisoners, *see Withers* v. *Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980), institutionalized mentally retarded, *see Youngberg* v. *Romeo*, 457 U.S. 307 (1982), or children placed in foster homes, *see Doe* v. *New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981). A special relationship may also be based, in part, on the state's knowledge that a particular person faces a special danger. *See, e.g., Jensen* v. *Conrad*, 570 F. Supp. 114 (D.S.C. 1983) (social service workers' failure to investigate and protect reported victims of child abuse actionable under § 1983), *aff'd in part and dismissed in part*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985);[3] *Beck* v. *Kansas University Psychiatry*

[3] In *Jensen*, the Fourth Circuit held that state officials have an affirmative constitutional duty to protect persons who have a special relationship with the state, but declined to decide whether reported victims of child abuse had such a special relationship. 747 F.2d at 194-195. The court found that the defendants were entitled to qualified immunity because the duty of protection was not clearly established at the time of the alleged wrongdoing. *Id.* The court, however, outlined factors that should be considered in a "special

Foundation, 580 F.Supp. 527 (D. Kan. 1984) (plaintiffs stated a cause of action under § 1983 against officials who released prisoner known to pose a special risk to decedents).

Notwithstanding the "special relationship" plaintiff's decedent may have had with the state, the causal connection between defendants' conduct and Gilmore's murder is even more remote that the circumstances involved in *Martinez* and, therefore, is insufficient to support § 1983 liability. In *Martinez*, the defendant parole board made the decision to release a dangerous parolee. Here, plaintiff has not sued the board that made the decision to furlough Prendergast.

The county defendants were high-level officials who were not personally involved in the furlough decision. Of course, supervisory officials may be held responsible for the constitutional deprivations of subordinates to which they are "deliberately indifferent."[4] But, as will be explained below, plaintiff has failed to produce evidence suggesting that the county defendants acted with deliberate indifference to Gilmore's rights.

A. *County Defendants*

Assuming, arguendo, that the state has a constitutional duty to protect identifiable individuals from dangerous prisoners, and that such duty was clearly established in 1979 when Gil-

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relationship" analysis. These factors include: "1) Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident.... 2) Whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals.... 3) Whether the State knew of the claimants' plight." *Id.* at 194 n.11.

[4] Deliberate indifference establishes an "affirmative link" between the conduct of the supervisor and the deprivation of the subordinate. *See Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976); *Fernandez* v. *Chardon*, 681 F.2d 42, 55-56 (1st Cir. 1982), *aff'd*, 462 U.S. 650 (1983). Plaintiff argues that *Parratt* v. *Taylor*, authorizes § 1983 liability on the basis of simple negligence. But plaintiff's argument overlooks the fact that, in *Parratt*, the Court assumed it was dealing with supervisory personnel directly involved in the alleged wrongdoing. *See* 527 U.S. at 537 n.3.

more was murdered,[5] *see Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), defendant county officials may not be held liable under § 1983 unless they acted with deliberate indifference to that duty. *See supra* note 4. Defendant Middlesex County may not be held liable unless defendants' omissions amounted to a "policy" of constitutional deprivations.[6] *See Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978).

Plaintiff maintains that the furlough program at Billerica was so deficient in light of defendants' statutory responsibilities as to amount to a policy of encouraging or acquiescing to constitutional violations. Specifically, plaintiff complains that the furlough guidelines allowed the contract board to make furlough decisions without reviewing a prisoner's psychiatric records or details of his offense. According to the plaintiff, state law requires the superintendant to secure this kind of information, and the county commissioners to ensure that the superintendant obeys the law.[7] These contentions are insufficient to support an inference of deliberate indifference or acquiesence to constitutional violations.

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[5] It is difficult to say that such a duty was clearly established in 1979, since the Supreme Court in *Martinez* left the question open in 1980. *See Jensen* v. *Conrad*, 747 F.2d at 191-92. In any event, it is necessary to go beyond this question because defendant county of Middlesex is not entitled to qualified immunity.

[6] In a suit against county policy-makers, deliberate indifference suggests a "policy" of violations, *see, e.g., Wellington* v. *Daniels*, 717 F.2d 932, 935-36 (4th Cir. 1983), and vice-versa.

[7] Mass. Gen. Laws, ch. 127, § 135 provides:

> The ... superintendant ... shall furnish to the parole board all information in his possession relating to any prisoner whose case is under consideration. As each prisoner is received in the ... houses of correction, it shall be the duty of the ... superintendant ...., while the case is still recent, to cause to be obtained and filed information as complete as may be obtainable at that time with regard to such prisoner. Such information shall include a complete statement of the crime for which he is then sentenced, the circumstances of such crime, the nature of his sentence, the court in which he was sentenced, the name of the judge and district attorney, and copies of such probation reports as may have

The furlough policy at Billerica is not suspect on its face.[8] According to the furlough guidelines, the decision to grant a furlough is based on the following considerations: offense, institutional performance, resident's ability to conduct himself responsibly while in the community, prior furlough history, past history of escapes, length of sentence, cases pending and/or warrants, judgment whether the resident can be trusted to return at the designated time and not commit any criminal acts while on furlough, the need for community reintegration, and ability to obtain an acceptable furlough sponsor.

The guidelines do not indicate what the board should do if it lacks adequate information with regard to any of these factors. Further, the contract board was arguably negligent in granting a furlough in the absense of such information. But the vagueness of the guidelines alone hardly establishes that a policy existed of releasing dangerous prisoners, or that those who made policy were indifferent to the risks of furlough.[9] This is particularly true in light of the uncontroverted evidence

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been made, as well as reports as to the prisoner's social, physical, mental and psychiatric condition and history.... When all such existing available records have been assembled, they shall be made available to the parole board so as to be readily accessible when the parole or pardon of such prisoner is being considered.

Mass. Gen. Laws ch. 126, § 11 requires the county commissioners to "cause the rules established for the management of the house of correction and for the government of the prisoners therein to be strictly observed."

[8] The furlough program at Billerica was instituted in 1972 pursuant to Mass. Gen. Laws ch. 127, § 90A, which authorizes the Commissioner of Corrections or the superintendant of a county corrections facility to grant temporary releases for specified purposes under prescribed conditions. Corrections department regulations implementing the statute provide that "The facility administrator shall develop a written procedure for reviewing applications for furlough for those inmates eligible for furlough...." 103 C.M.R. § 946.05 (1978).

[9] Nor is deliberate indifference suggested by the fact that the guidelines do not require notification of potential victims about a prisoner's furlough. If a prisoner is believed to be a threat, the guidelines indicate that he should not be furloughed at all.

presented by the defendants that the furlough program had a success rate of over 99% prior to the Prendergast incident and that Sheriff Buckley and his staff kept weekly reports on furloughs and periodically reviewed the program. Plaintiff has failed to show a pattern of failures that should have put defendants on notice of a deficiency in the furlough program, or that would suggest their acquiesence in unconstitutional conduct. *Cf. Voutour* v. *Vitale*, No. 84-1159, slip op. at 20-21 (1st Cir. March 29, 1985) (per curiam) (policy of excessive use of force cannot be inferred absent pattern of striking police violence); *Delaney* v. *Dias*, 415 F.Supp. 1351, 1354 (D. Mass. 1976) (allegation of participation or acquiesence in constitutional deprivation necessary element of § 1983 liability for personal misfeasance).

Superintendant Bens' alleged failure to comply with Mass. Gen. Laws ch. 127, § 135, *see supra* note 7, is similarly insufficient to establish deliberate indifference. This provision refers to information to be gathered for parole purposes, not the furlough program. Moreover, pertinent information—including the Cavanaugh letter containing Dr. Fein's assessement of Prendergast—was assembled for the parole board. Based on that information, the board denied Prendergast's parole application.

Finally, deliberate indifference may not be inferred merely from the fact that the county commissioners knew of Prendergast's danger to Gilmore, based on his parole application, and yet failed to prevent Prendergast's furlough or warn Gilmore. The commissioners were not involved in individual furlough cases, nor did they know of Prendergast's furlough application. Pursuant to established practice, the commissioners sent Prendergast's parole denial and supporting documentation to Billerica by interdepartmental mail. The information was received by a "crisis intervention worker" responsible for processing parole applications. It should have been brought to the

attention of the superintendant or furlough administrator.[10] In the absence of any evidence that the commissioners knew or should have known that a breakdown in communication at Billerica was likely to occur, the commissioner's mode of transmitting the information regarding Prendergast does not suggest a conscious indifference to plaintiff's constitutional rights.

B. *Bridgewater Defendants*

The Bridgewater defendants were more directly involved in the decision to decline to petition for Prendergast's commitment than were the county defendants in the furlough decision.[11] But the commitment decision was too far removed from the murder for the Bridgewater defendants to be fairly held responsible for it. *Cf. Beck* v. *Kansas University Psychiatry Foundation*, 580 F.Supp. at 536 (complaint stated a § 1983 cause of action against officials who released prisoner, but not psychiatrists who treated him).

Whatever constitutional duty prison officials may have to identifiable victims to prevent the release of dangerous prisoners, no similar duty attaches to civil commitment decisions of psychiatrists. At a minimum, no such duty was clearly established at the time of the incidents in this case, and thus the Bridgewater defendants are immune from liability for civil damages.[12] *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

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[10] The furlough guidelines provide that: "Any officer or employee of the Sheriff's Department who receives any information which may affect the release of a resident already approved for a furlough shall bring such information immediately to the attention of the Master, and the furlough supervisor, or other person in charge of the House of Correction when the Master in not present at the facility."

[11] Defendant James Gilligan, the medical director at Bridgewater, was not involved in the commitment decision, however. His liability is predicated on delinquent supervision and training.

[12] There is no question that civil commitment decisions are discretionary functions to which qualified immunity attaches.

Under Massachusetts law, a person may not be committed to a mental health facility unless a court finds that a failure to hospitalize the person would create a likelihood of serious harm by reason of the person's mental illness. Mass. Gen. Laws Ann. ch. 123, § 8 (West Supp. 1985). Section 15(e) of chapter 123, under which Prendergast was returned to Bridgewater in aid of sentencing, *authorized* the Bridgewater superintendent or medical director to petition the court for Prendergast's commitment. It is significant that the statute does not *require* the medical director to petition for commitment of dangerous, mentally ill persons; to do so might threaten their constitutionally protected liberty interests.[13]

The prediction of dangerous behavior is an uncertain, inexact science. *See Rogers* v. *Okin*, 478 F.Supp. 1342, 1365 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated*, 457 U.S. 291 (1982). In furlough or parole situations, such uncertainty might reasonably be expected to be resolved in favor of the public, at the expense of the individual who has no constitutional right to early release. In the civil commitment context, however, such uncertainty should generally be resolved in favor of the individual. Imposing a constitutional obligation on state hospital officials to petition for the commitment of persons whom they "know" or "should know"

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[13] The Supreme Judicial Court, in interpreting a prior statute authorizing temporary commitment, stated:

> It is plain that any statute is to be strictly construed which purports to authorize a person or an officer of government to restrain for any length of time a person in the exercise of his personal liberty. So construed, § 79 requires by necessary implication that a physician, as also everyone of the officers named in § 79, shall act in good faith and without negligence whenever, acting under said section, they exercise the power conferred on them by that statute.

Karjavainen v. *Buswell*, 289 Mass. 419, 426, 194 N.E. 295 (1935). Plaintiff construes this statement as evidence of defendants' duty to protect Gilmore. The existence of such a duty under state law, however, would not in itself be sufficient to establish that defendants had a constitutional duty to protect her. *See, e.g., Baker* v. *McCollan*, 443 U.S. 137, 146 (1979).

are dangerous and mentally ill might shift the burden of uncertainty so as to threaten the subject of inquiry with deprivation of liberty without due process of law. *But see, e.g., Durflinger* v. *Artiles*, 234 Kan. 484, 673 P.2d 86 (1983) (recognizing tort action for negligent release of mental patient with violent propensities, noting that duty of care "must take into consideration the uncertainty which accompanies psychiatric analysis" [citation omitted]). In the absence of any precedent suggesting such a duty, this court finds that the Bridgewater defendants did not deprive plaintiff's decedent of any clearly established constitutional right.

III.

Conclusion

The defendants have demonstrated that there is no genuine issue as to any material fact, and that they are entitled to summary judgment with respect to the § 1983 claims. The court declines to exercise jurisdiction over the pendent state claims.

An order will issue.

s/ J.L. TAURO
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-1749-T

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, ADMINISTRATOR,
PLAINTIFF

v.

JOHN J. BUCKLEY, JOHN L. DANEHY, MICHAEL E. McLAUGHLIN, S. LESTER RALPH, COUNTY OF MIDDLESEX, RALPH J. BENS, CHARLES GAUGHAN, JAMES GILLIGAN, ROBERT A. FEIN AND DENNIS F. KOSON,
DEFENDANTS

AFFIDAVIT OF JOSEPH P. GILMORE

I, JOSEPH P. GILMORE on oath depose and say:

1. I reside at 29 Leonard Street, Canton, Massachusetts 02118.

2. I am the father of Patricia A. Gilmore (Patricia) and I am Administrator of her estate.

3. At the time of her death, Patricia was twenty-four years of age and lived with her parents and eight of eleven siblings. Patricia was employed at the Norwood Branch of the Bay State Federal Savings and Loan Association for a period of approximately four years prior to her death, and had recently been promoted to Assistant Manager. Patricia also was employed part-time, evenings and weekends, as a receptionist.

4. During the latter months of 1978 and approximately the first half of 1979, Bradford Prendergast (Prendergast) many times threatened and assaulted Patricia. The threats were often accompanied by bizarre conduct, which caused us to believe that Prendergast constituted a serious danger to Patricia's life.

5. As a result of the threats made by Prendergast and his bizarre conduct, Patricia sought to have Prendergast taken into official custody. She made complaints to the Norwood Police Department, the Canton Police Department, to the Clerk of Courts, Northern Norfolk Division (Dedham District Court) and made applications for the issuance of complaints to the Clerk of Courts, Southern Norfolk Division (Stoughton District Court), in January and February, 1979 and on July 2, 1979. Patricia also sought and received on May 15, 1979 a court order that Prendergast stop abusing her.

6. The Norfolk County District Attorney, on July 2, 1979, charged Prendergast with threatening Patricia's life in violation of Massachusetts General Laws.

7. On or about July 12, 1979, Prendergast was arraigned and was ordered to be hospitalized at Bridgewater for observation and examination.

8. On or about August 20, 1979, Prendergast admitted to facts sufficient to warrant a finding of guilty on the complaint charging him with threatening Patricia's life.

9. The district court, Scheiber, J. ordered that Prendergast be returned to Bridgewater for an examination to aid the Court in sentencing.

10. Prendergast remained at Bridgewater for examination for a total of 79 days between the date of his arraignment in July 1979 and his final sentencing in September 1979.

11. On September 28, 1979, Judge Scheiber sentenced Prendergast to 6 months in the House of Correction, the maximum sentence provided by law.

12. On December 20, 1979, while on furlough, Prendergast entered our home at approximately 2:00 P.M. Prendergast assaulted Patricia and members of our family, and then kidnapped Patricia at gunpoint. Hours later, Patricia's body was found alongside a road in Middleboro, Massachusetts. Patricia had been stabbed over twenty-five times.

Sworn under the pains and penalties of perjury.

s/ JOSEPH P. GILMORE
JOSEPH P. GILMORE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SEPTEMBER 21, 1984

Then personally appeared before me the above named Joseph P. Gilmore and swore that the above facts are true of his knowledge.

s/ PAULA J. CROCKER
Notary Public

My Commission Expires:
11-4-88

0913A

FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2134.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
PETITIONER,

v.

JOHN J. BUCKLEY, ET AL.,
RESPONDENTS.

Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

R. ROBERT POPEO,*
THOMAS R. MURTAGH,
PETER A. BIAGETTI,
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.,
One Financial Center,
Boston, Massachusetts 02111.
(617) 542-6000

EDWARD E. KELLY,*
BARRON & STADFELD,
18 Tremont Street,
Boston, Massachusetts 02108.
(617) 723-9800

JAMES F. MEEHAN,*
CYNTHIA J. COHEN,
MEEHAN, BOYLE & COHEN, P.C.,
85 Devonshire Street,
Boston, Massachusetts 02109.
(617) 523-8300

LEE CARL BROMBERG,*
BENJAMIN J. NAITOVE,
BROMBERG, SUNSTEIN & MCGREGOR,
10 West Street,
Boston, Massachusetts 02111.
(617) 426-6464

*Counsel of Record
Dated: July 31, 1986

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

I. Are the circuit courts in conflict in their applications of the legal principles which this Court set forth in *Martinez* v. *California*, 444 U.S. 277 (1980)?

II. Did the First Circuit Court of Appeals apply the *Martinez* principles to the comprehensive record before it in a manner so inconsistent with precedent to warrant this Court's review and rearticulation of those principles?

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Table of Authorities Cited.

Cases.

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No. 85-2134.

In the Supreme Court of the United States.

OCTOBER TERM, 1985.

ESTATE OF PATRICIA E. GILMORE,
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JOHN J. BUCKLEY, ET AL.,
RESPONDENTS.

Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case.

STATEMENT OF FACTS.

Respondents Middlesex County, John L. Danehy, Michael E. McLaughlin, S. Lester Ralph, John J. Buckley and Ralph J. Bens (hereinafter collectively referred to as "the County defendants"), adopt by reference the summary of relevant facts set forth by the First Circuit Court of Appeals, *Petition* at A. 2-8, with the following highlights of particularly important facts.

At the time Bradford Prendergast was deemed eligible for furlough from the Billerica House of Correction, the prison's

furlough program was administered pursuant to a written set of "General Guidelines Governing Furlough". *Petition* at A. 6 & n.5. The "Guidelines" provided specific criteria by which a prisoner "classification" board was to determine furlough eligibility, *id.*, required all Billerica personnel immediately to report any information which might affect the release of a furlough applicant to the furlough supervisor or to the prison superintendent, *id.* at A. 7 & n.6, and mandated that, once such information was reported, ". . . under no circumstances shall the resident be released until the matter is resolved." *Id.*

Prior to his murder of Patricia Gilmore, Prendergast had been deemed eligible for furlough pursuant to the "Guidelines," and twice had been released on furloughs, each time returning to Billerica without incident. *Id.* at A. 6, 7. At no time, however, did any of the County defendants have knowledge of Prendergast's furloughs. *Id.* at A. 7. Neither Bens nor Buckley ever received any information from any source regarding Prendergast's reported dangerousness to Patricia Gilmore. *Id.* When the County Commissioners, sitting as the county parole board, did receive such information, they denied Prendergast's petition for parole and forwarded his parole file, including the full report of dangerousness, to Billerica, where a "crisis intervention worker" mistakenly reported its contents only to one inmate counselor. *Id.* at A. 5, 7. Contrary to the explicit requirements of the "Guidelines," the information regarding Prendergast's reported dangerousness was not relayed to then-Superintendent Bens, or to any other County defendant. *Id.* at A. 7 & n.6.

On December 20, 1979, the second day of his third furlough from Billerica, Prendergast kidnapped and murdered Patricia Gilmore. *Id.* at A. 8. This occurred just two days prior to the date on which Prendergast was to be discharged permanently from the institution after having served his sentence in full. *Id.*

Reasons for Denying the Writ.

INTRODUCTION.

The petition for certiorari should be denied because the guiding principles of *Martinez* v. *California*, 444 U.S. 277 (1980), consistently have been applied by the circuit courts, and no further refinement of those principles is necessary. The *Martinez* court could not have made clearer that: (1) a deprivation of constitutional right by a private actor does not constitute state action absent a showing of special circumstances; and (2) each case in which such deprivation is alleged must be determined with careful sensitivity to its particular factual setting.

Guided by *Martinez*, the circuit courts have applied its reasoning with remarkable consistency to the various records before them. Any variations in result plainly are a function of the factual settings in which the cases arose, and do not reflect any conflict in the interpetation of *Martinez*. Indeed, the circuit courts have been virtually uniform in their application of the guiding principles set forth by this Court. *Infra* at Part I. Moreover, the First Circuit's application of those principles to the facts before it in this case — facts amplified by petitioner in the 1100 page appendix he submitted on appeal — is in harmony with the decisions of the other circuit courts, and is both legally and factually sound. *Infra* at Part II.

I. THERE IS NO CONFLICT IN THE CIRCUIT COURTS' CONSISTENT APPLICATIONS OF GUIDING PRINCIPLES TO DISTINCTIVE FACTS.

The *Martinez* Court found that, "at least under the particular circumstances" of the parole decision before it, "appellant's

decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." 444 U.S. at 285. Since then, the "remoteness" inquiry articulated in *Martinez* has been undertaken by the various circuit courts confronting such cases. While obviously based upon differing facts, the circuit cases have been remarkably consistent in both approach and result. State defendants in virtually all cases have been found either to have had no statutorily imposed duty to the victim, to have had no custody or control over the victim, or to have done nothing to have placed the victim in a position of danger.

Contrary to the position taken by petitioner, those cases clearly demonstrate that there is no conflict in the legal principles applied, and therefore no supportable basis for certiorari.

For example, in the Eleventh Circuit case to which petitioner (*Petition* at 11) and the First Circuit opinion (*id.* at A. 15 & n.15) refer, the Court of Appeals first traced the continuity of application of the *Martinez* rationale through each of the cases cited by petitioner, then held that state youth authorities were not liable under § 1983 for a furloughed prisoner's attack on a known potential victim, despite their knowledge of his psychiatric and criminal history. *Jones* v. *Phyfer*, 761 F.2d 642, 644-646, *reh. denied*, 768 F.2d 1353 (11th Cir. 1985). Citing the factors inferred from *Martinez* and the circuit court cases, the *Jones* panel held that the defendant officials' mere knowledge of the potential victim's identity was not, in view of all the facts in the record, ". . . sufficient to establish the required special relationship that would impose a duty on the state to protect plaintiff or to warn her of [the prisoner's] . . . release." 761 F.2d at 646-647. Petitioner's misplaced reliance on *Jones* therefore runs headlong into the fact that its reasoning — and result — mirror those of the First Circuit in this case.

Similarly, the Third Circuit Court of Appeals most recently applied the reasoning of *Martinez*, and of virtually all of the

circuit court opinions on which petitioner seeks to rely, to facts in which a child abuse victim was beaten to death after a state agency negligently returned her to the home where she previously had been abused. *Estate of Bailey* v. *County of York*, 768 F.2d 503 (3d Cir. 1985). The *Bailey* court reversed dismissal of a § 1983 claim alleged against the state, not because of any conflict or inconsistency in the district court's application of the *Martinez* rationale, but simply on the ground that, "We find it sufficient to hold that in the special circumstances pleaded here, this case falls on the other side of the line suggested in *Martinez*." *Id.* at 511. In *Bailey*, those "special circumstances" included a statutory duty imposed on the defendant child welfare officials to protect the victim, and the fact that those officials previously had removed the victim from the dangerous environment, and then deliberately resituated her in the same locus of danger. *Id.* at 505, 509. None of these circumstances was present in the record before the First Circuit. *Bailey*'s reasoning simply demonstrates that, when a principle by which facts are measured is drawn and consistently applied, distinguishable sets of circumstances will fall on either side of it.

Such consistent application of *Martinez* was underscored in a Fourth Circuit opinion to which petitioner cites. *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985). There, the Court of Appeals first summarized the various circuit court decisions, and then suggested, in *dicta*, "*some* of the factors that should be included in a 'special relationship' analysis." *Id.* at 194 & n.11 (emphasis added). One of those factors, the presence of an affirmative statutory duty to protect the victim, was conspicuously absent from the record before the First Circuit in this case. *Petition* at A. 14 & n.14.[1] Indeed, in a case

[1] Another of the *Jensen* factors, "[w]hether the State knew of the claimants' plight," 747 F.2d at n.11, also is particularly relevant to the record before the

more analogous to the record before the First Circuit in this case, the Fourth Circuit Court of Appeals held that, absent any such statutory duty to protect, parole officials' failure to incarcerate a parolee did not deprive the parolee's victim of any constitutional right. *Fox* v. *Custis*, 712 F.2d 84 (4th Cir. 1983). Moreover, the factors outlined in *Jensen* are consistent with both the *Martinez* rationale and the scrutiny applied to the peculiar facts of this case by the First Circuit Court of Appeals. *Petition* A. 12-15. The First Circuit's holding that no "special relationship" had been established on the extensive record before it therefore is no more worthy of review by this Court than the similarly fact-bound decision in *Jensen*. 747 F.2d at 195.

Petitioner also relies on a district court decision, *Beck* v. *Kansas University Psychiatry Foundation*, 580 F.Supp. 527 (D. Kan. 1984), despite the fact that the *Beck* court erroneously relied on state tort law principles to ascertain the existence of a special relationship between the victims and the state defendants. 580 F.Supp. at 534. *Cf. Martinez* v. *California*, 444 U.S. at 285 (§ 1983 claims not properly analyzed under state tort law). *See also Daniels* v. *Williams*, 474 U.S. , 106 S.Ct. 662, 667, 88 L.Ed.2d 662, 669 (1986) (Fourteenth Amendment does not embrace state tort law concepts). Further, though the Tenth Circuit Court of Appeals had no opportunity to review the reasoning in *Beck*, it has made clear its understanding of the *Martinez* rationale, noting that "[t]he remoteness discussed in *Martinez* was not simply a matter of time," and affirming — on other facts demonstrating remoteness — the dismissal of a rape victim's § 1983 claim against parole officers. *Humann* v. *Wilson*, 696 F.2d 783, 784 (10th Cir. 1983).

First Circuit: none of the County defendants ever knew of Prendergast's furloughs, and two of them, Bens and Buckley, did not even know of any report of Prendergast's dangerousness to Patricia Gilmore. *Petition* at A. 6, 7.

Finally, the Seventh Circuit opinion to which petitioner and the First Circuit cite, *Petition* at 13, A. 10, 11, applied the *Martinez* rationale in the context of the state's allegedly reckless release of a murderous mental patient, noting that ". . . there is no constitutional right to be protected by the state against being murdered by criminals or madmen," and therefore holding that a state may not be liable under § 1983 unless it "puts a man in a position of danger from private persons and then fails to protect him . . .." *Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Finding only a failure by the state to protect the appellant, but no affirmative *placement* of her in a position of danger, the *Bowers* panel affirmed dismissal of the complaint on a ground just as cogent to the First Circuit's affirmance here. *Petition* at A. 14, 15.

In sum, it is clear that the circuit courts are in harmony in their interpretation and application of *Martinez*, and that the legal principles pertinent to this case have developed in an orderly and consistent manner. Although specific facts, such as the existence of an express statutory duty, may lead to different results in different cases, that is not evidence of any inconsistency in the courts' legal analyses. In *Martinez*, this Court marked the distinction between common law tort liability and due process violations; no finer line need be drawn.

II. There Was No Error in the First Circuit's Thorough Analysis of the Facts Before It.

The First Circuit's analysis, like that in *Martinez*, revolved around the essential distinction between the conduct of a released prisoner and the action — or, more accurately, inaction — of the state which allowed that release to occur. *Petition* at A. 10, 11. As outlined in Part I, *supra*, circuit courts confronted by claims and circumstances analogous to those pre-

sented in *Martinez* consistently have applied its distinction between private conduct and state-sponsored deprivation, and, in light of the factual sensitivity underlined by *Martinez*, have made independent assessments of the "remoteness" between the state decision and the victim's deprivation. Mindful of this precedent, the First Circuit Court of Appeals conducted precisely the sort of factual inquiry urged in *Martinez*:

> It would seem from what we have just said that we should affirm without more. However, both the Supreme Court in *Martinez* and various circuit courts, including the Seventh Circuit, have indicated that in some special circumstances, where a state has assumed a 'special custodial or other relationship' in respect of a particular person, the state's failure to protect that person might implicate the due process clause. *Fox* v. *Custis*, 712 F.2d 84, 88 (4th Cir. 1983) (collecting cases). We must inquire, therefore, whether any such special circumstances exist here.

Petition at A. 11, 12.

That inquiry began with a threshold finding, prompted by the *Martinez* Court's counsel that, state tort law principles of duty and proximate cause notwithstanding, a violation of § 1983 could be proven only if the state defendants had " 'deprive[d]' appellants' decedent of life within the meaning of the Fourteenth Amendment." *Martinez*, 444 U.S. at 285. On that score, and with the full range of constitutional and statutory entitlements urged by petitioner before it, the First Circuit panel correctly held that the state's "fail[ure] to provide the victim protection . . . is not a violation of the due process clause . . .." *Petition* at A. 11 & n.10. Petitioner does not now directly challenge that finding, but seeks to divert this Court's

attention from it by citing to the broad, general provisions of the Preamble and three Articles of the Constitution of the Commonwealth of Massachusetts. *Petition* at A. 8-10. Nothing in that sweeping language, however, cures the flaw in petitioner's argument, recognized by the First Circuit when it observed, ". . . that the plaintiff has failed to cite any provisions of state law that either imposed a constitutionally cognizable duty on the defendants to protect Gilmore, or afforded her an entitlement to protection." *Id.* at A. 14 & n.14.

The First Circuit followed this survey of constitutional, statutory, and regulatory provisions with an equally complete investigation of the factual circumstances which alone might support a finding of agency, custody or other special relationship sufficient to elevate a madman's act to the level of state-sponsored deprivation of a constitutional right. *See, e.g., Bowers* v. *DeVito,* 686 F.2d 616, 618 (7th Cir. 1982). In so doing, the First Circuit's analysis did not depart from the principles developed in *Martinez* and its progeny, but inferred from those cases the full panoply of factors which might bear upon whether the County defendants' release of Prendergast was — or was not — too "remote" from Patricia Gilmore's death to support a finding of the state action necessary to prove a violation of § 1983.

First, relying upon a factor applied by the *Martinez* court and panels in the Third, Fourth and Seventh Circuits, the First Circuit sought to determine whether Prendergast's murder of Gilmore affirmatively had been prompted or encouraged by the County defendants in a manner which reasonably could have placed him in an *agency* relationship with the state. After its review of the extensive record, the Court concluded:

> Furthermore, even though Prendergast was legally in state custody while on furlough, Prendergast was in no sense an agent of the state. The state played no

> part in creating the threat that Prendergast posed to Gilmore, Prendergast's murderous design was independently conceived and executed, and the state neither condoned nor encouraged his behavior. *See Martinez*, 444 U.S. at 285, 100 S.Ct. at 559; *Estate of Bailey* v. *County of York*, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting); *Beard* v. *O'Neal*, 728 F.2d at 899; *Fox* v. *Custis*, 712 F.2d at 87 n.2.

Petition at A. 14.

Next, the First Circuit sought to ascertain from the record whether Gilmore herself had been in a *custody* relationship with the state, such that her constitutional rights affirmatively were placed in jeopardy by the state's action, and found:

> Here, the state and county defendants did not have custody or control over Gilmore, nor did they condone, ratify or in any way instigate Gilmore's homicidal encounter. *See, e.g., Jackson* v. *City of Joliet*, 715 F.2d 1200, 1204-5 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984).

Petition at A. 15.

Finally, the First Circuit went on to consider any evidence in the record of some other sort of special relationship. In so doing, the Court considered the very factors implicitly made relevant by the inquiries undertaken in *Martinez* and in the circuit court cases cited by petitioner, *i.e.*, "any knowledge the state defendants had of the special danger that Prendergast posed to Gilmore or the temporal proximity between Prendergast's release on furlough and Gilmore's murder . . .." *Id.*

at A. 14. Here again, the panel analyzed the relevant facts squarely within the framework of the *Martinez* line, and concluded that, "irrespective" of certain facts regarding those two particular criteria, the circumstances *in toto* demonstrated ". . . no special relationship of constitutional dimension between Gilmore and the state . . .." *Id.* at A. 15. As such, the First Circuit's thorough examination of the voluminous record before it, and its decision based on *all* of those facts, presents no more genuine a basis for review than analogous circuit court decisions which considered similar factors and which this Court prudently has declined to review.[2]

In fact, this case is less worthy of review, since at least three substantively distinct grounds on which the First Circuit explicitly reserved comment, *Petition* at A-16, provide alternative bases on which this Court could affirm without reaching the question presented by petitioner.

First, even assuming arguendo that *Martinez* created a "right" to be protected by prison officials from the acts of a released prisoner, that purported right was not "clearly established" in December, 1979, and therefore the County defendants are entitled to qualified immunity in this case.[3] Second, as

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[2] *See e.g., Jackson* v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (ordering dismissal of § 1983 claims against state officials despite allegation that police at scene of victims' accident knew victims were burning to death in wrecked car and recklessly failed to intervene); *Beard* v. *O'Neal*, 728 F.2d 894 (7th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 104, 83 L.Ed.2d 48 (1984) (affirming summary judgment of § 1983 claim against state officials despite proof that government informant who witnessed murder of victim knew of imminent threat to victim yet failed to intervene). These cases demonstrate, *inter alia*, that a state defendant's knowledge of a threat to a specific victim and the lapse of time between the defendant's failure to act and the deprivation of constitutional rights are but two of the many factors which pertain to the "remoteness" inquiry suggested in *Martinez*.

[3] *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Jensen*, 747 F.2d at 193-194 (affirming that state officials who failed to protect victims of fatal beatings in 1979 were entitled to qualified immunity because "an affirmative duty of protection under the fourteenth amendment did not emerge until after 1980").

the District Court originally concluded in granting summary judgment, the record here suggests neither a policy which caused Patricia Gilmore's death,[4] nor any deliberate indifference toward or reckless disregard for her constitutional rights,[5] particularly "in light of the uncontroverted evidence . . . that the furlough program had a success rate of over 99% prior to the Prendergast incident . . .." *Petition* at A. 26, 27 & n.9. Finally, even if petitioner could prove that Gilmore suffered a deprivation as the proximate result of state action, he could not proceed on his § 1983 claim in light of the adequate post-deprivation remedy offered by the Massachusetts Tort Claims Act, M.G.L. c. 258, pursuant to which petitioner, along with Ms. Gilmore's parents and siblings, already have commenced three separate actions in state court against the County of Middlesex and the Commonwealth of Massachusetts.[6]

These alternative grounds for the First Circuit's decision make review by this Court unwarranted.

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[4] *See Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976); *Fernandez* v. *Chardon*, 681 F.2d 42, 55-56 (1st Cir. 1982), *aff'd*, 462 U.S. 650 (1983).

[5] *See Pembaur* v. *City of Cincinnati*, 475 U.S. , 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *Oklahoma City* v. *Tuttle*, 471 U.S. , 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978).

[6] *See Parratt* v. *Taylor*, 451 U.S. 527 (1981), *overruled on other grounds*, *Daniels* v. *Williams*, 474 U.S. , 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Conclusion.

For the above-stated reasons, the County defendants submit that there is no conflict between the circuit courts' application of the guiding principles of *Martinez*, no inconsistency between those applications and the First Circuit's comprehensive analysis of the record in this case, and therefore, no basis for compelling review by this Court. The *Petition for a Writ of Certiorari* should be denied.

Respectfully submitted,

R. ROBERT POPEO,*
THOMAS R. MURTAGH,
PETER A. BIAGETTI,
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.,
One Financial Center,
Boston, Massachusetts 02111.
(617) 542-6000

For Respondents Middlesex County and John L. Danehy

EDWARD E. KELLY,*
BARRON & STADFELD,
18 Tremont Street,
Boston, Massachusetts 02108.
(617) 723-9800

For Respondents S. Lester Ralph and Michael E. McLaughlin

JAMES F. MEEHAN,*
CYNTHIA J. COHEN,
MEEHAN, BOYLE & COHEN, P.C.,
85 Devonshire Street,
Boston, Massachusetts 02109.
(617) 523-8300

For Respondent John J. Buckley

LEE CARL BROMBERG,*
BENJAMIN J. NAITOVE,
BROMBERG, SUNSTEIN & MCGREGOR,
10 West Street,
Boston, Massachusetts 02111.
(617) 426-6464

For Respondent Ralph J. Bens

*Counsel of Record
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

No. 85-2134

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
Petitioner,

v.

JOHN J. BUCKLEY, ET AL.,
Respondents.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS ROBERT FEIN, DENNIS KOSON AND JAMES GILLIGAN IN OPPOSITION TO PETITION FOR CERTIORARI

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

ROBERTA THOMAS BROWN*
Legal Counsel to the
Attorney General

PAULA J. DeGIACOMO
Assistant Attorney General
Executive Bureau
One Ashburton Place, Rm. 2001
Boston, MA 02108
Tel. (617) 727-4538

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* Counsel of Record

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Respondents.

The respondents Robert Fein, Dennis Koson and James Gilligan respectfully request that this Court deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 787 F.2d 714 (1st Cir. 1986).

STATEMENT OF THE CASE

The respondents adopt the statement of the facts set forth in the opinion below at 787 F.2d 714, 715-718.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FIRST CIRCUIT'S OPINION IN GILMORE V. BUCKLEY IS NEITHER IN ERROR NOR IN CONFLICT WITH THE THIRD, FOURTH AND ELEVENTH CIRCUITS.

The sole question presented in the petition is whether the First Circuit erred in holding that plaintiff failed to state a claim under 42 U.S.C. §1983 where some of the state and county defendants knew or should have known that a prisoner posed a special danger to Patricia Gilmore who was murdered by the prisoner the day after his release on furlough from a county facility. Petitioner seeks certiorari on the basis that there is a conflict between the First Circuit and the Third, Fourth and Eleventh Circuits, asserting that the latter courts of appeals hold that a state defendant's knowledge that a third

party poses a special danger to an identified victim will alone support a claim for violation of due process under 42 U.S.C. §1983. (Petition 11).

The First Circuit held in this case that the plaintiff had not made out a cause of action under the Fourteenth Amendment, where the victim died at the hands of a private individual who was neither an agent of the state nor employed by the state and where the victim, not in the state's custody or control, did not stand in any "special relationship" with the state. Gilmore v. Buckley, 787 F.2d 714, 720-722 (1st Cir. 1986). The court did not accept the argument that a constitutional duty to protect Gilmore arose solely "because at least some of the defendants knew or

should have known that Prendergast posed a special danger to her." Id. at 721. This holding is correctly based on the historical function of the Fourteenth Amendment and on Martinez v. California, 444 U.S. 277 (1980) and its progeny. It is not in conflict with the Third, Fourth and Eleventh Circuits.

By its express language the Fourteenth Amendment provides in part "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The purpose of the Fourteenth Amendment was, and is, to prevent governmental power from "being used for purposes of oppression," Daniels v. Williams, ____ U.S. ____, 106 S.Ct. 662, 665 (1986) (citation omitted) and to protect individuals from affirmative

abuse of power by state officials. Daniels v. Williams, 106 S.Ct. at 664-665; Davidson v. Cannon, ____ U.S. ____, 106 S.Ct. 668, 670 (1986), Monroe v. Pape, 365 U.S. 167, 172 (1961).

This is a rule of substantive constitutional law, Lugar v. Edmonson Oil, 457 U.S. 922, 936 (1982) long adhered to by this Court. See, e.g., Civil Rights Cases, 109 U.S. 3, 11, 17-18 (1883) affirming the essential dichotomy set forth in that Amendment between deprivation by the state, subject to scrutiny under its provisions, and private conduct "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield. Shelley v. Kraemer, 334 U.S. 1 (1948).

As explained in Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982):

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. (citation omitted). But there is no constitutional right to be protected by the State against being murdered by criminals or madmen. . . . The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

This was the fundamental basis for this Court's holding in Martinez and for the First Circuit's holding below.

In Martinez this Court took as true allegations that a parole board recklessly, willfully and wantonly released a dangerous criminal whose release the parole board knew to create

a clear and present danger that the parolee would murder someone. Martinez, 444 U.S. at 280. Notwithstanding these allegations it was held that the parole board did not "deprive" plaintiff's decedent of life within the meaning of the Fourteenth Amendment. Id. at 285.

> [T]he Fourteenth Amendment protected [decedent] only from deprivation by the "State . . . of life. . . without due process of law." Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action...
>
> Her life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. Cf. Scheuer v. Rhodes, 416 U.S. 232. (Footnote omitted.)

Accordingly, a number of courts of appeals have, since Martinez, agreed that "in general, there simply is 'no

constitutional right to be protected by the state against criminals or madmen,' and that because, in corollary, there is no constitutional duty [on the state] to provide such protection, its failure to do so is not actionable under section 1983." Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) quoting Bowers v. DeVito, supra, at 618. 1/

There is language in some of these cases that a constitutional right of protection under the due process clause

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1/ See, also, Jones v. Phyler, 761 F.2d 642 , 646-647 (11th Cir. 1985); Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984); Jackson v. City of Joliet, 715 F.2d 1200, 1203-1204, 1206 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984); Wright v. City of Ozark, 715 F.2d 1513, 1516 (11th Cir. 1983); Jensen v. Conrad, 747 F.2d 185, 193 (4th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1754 (1985).

"may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons." Fox v. Custis, 712 F.2d at 88 (4th Cir. 1983) (emphasis in original); Gilmore, 787 F.2d at 720.

For example, Bowers suggested that such a duty may arise where the state takes an active role in putting a person in danger from private persons "and then fails to protect him." Bowers v. DeVito, 686 F.2d at 618. See, e.g., White v. Rochford, 592 F.2d 381 (7th Cir. 1979) where police abandoned three children in an automobile after arresting and taking away their custodian. In Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), the Fourth Circuit suggested the following factors to assist in determining the

type of "special relationship" which could remove a situation from the general rule against an affirmative, constitutionally based duty to the public: 1) whether the victim or perpetrator was or had been in legal custody at the time of the incident; 2) whether the state has expressly indicated a desire "to provide affirmative protection to a particular class or specific individuals" and 3) whether the state knew of the claimant's plight. Id. at 194-195, n.11.

Petitioner's reliance on Jensen for the proposition that the Court held that the existence of the third factor alone is itself enough to find a "special relationship" is misplaced. To the contrary, Jensen suggests in dicta, an evaluation of all three factors, not

exclusive reliance on the third, to determine the existence of a special relationship. At most, the court stated merely that the knowledge of the state defendants of the victim's plight "would strengthen the argument that some sort of special relationship had been established." Id. at 195, n.11, and then decided the case on grounds of qualified immunity without determining whether a special relationship in fact existed. Jensen thus does not present a conflict "real or intolerable" with the First Circuit. Rice v. Sioux City Cemetary, 349 U.S. 70, 79 (1955).

All courts of appeals which have found an affirmative duty to protect have done so in cases which involve a prison or institutional setting, see

Gilmore, 787 F.2d at 720-721 (collecting cases), or where the state has otherwise undertaken a custodial role concerning the victim, Doe v. New York City Department of Social Services, 709 F.2d 782 (2nd Cir. 1981) cert. denied, 464 U.S. 864 (1983) (child placed by state agency in foster home abused by foster parent); Estate of Bailey v. County of York, 768 F.2d 503 (3rd Cir. 1985); Jensen v. Conrad, 747 F.2d at 187-188 (state agency entered into agreement with abusive mother that child and mother reside with grandmother but failed to enforce the agreement).

Bailey, supra and Jensen, supra are distinguishable on their facts and do not support petitioner's claim that the Third and Fourth Circuits are in conflict with the First Circuit's opinion. Neither

Bailey nor Jensen holds that knowledge by the state defendants of the victim's plight alone is the decisive factor which creates a "special relationship" and an affirmative duty to protect the victim under the Due Process Clause.

Nor does the Eleventh Circuit in Jones v. Pryfer, 761 F.2d 642 (11th Cir. 1985). In Jones, plaintiff claimed that a special relationship was created because she was the forseeable victim of a rape by a prisoner just released on furlough. The court found that it was not sufficient to establish a special relationship where the prisoner had broken into plaintiff's house and where she was instrumental in having him convicted and sentenced. Although the court noted the importance of the factor

of knowledge of a victim's plight, the holding in Jones, supra is that all circumstances of the particular case should be taken into account. ("Plaintiff has not established the required special relationship, based on the interactions of the victim, Brown, and the Department of Youth Services to invoke the due process protection of the Fourteenth Amendment.") Id. at 647. Accord, Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983).

There can be no assertion in this case that the state, as personified by the state psychiatrists, had assumed by statute or conduct any special relationship with Patricia Gilmore which involved providing for her safety, as opposed to

the safety of a member of the general public.[2/]

2/ Petitioners argued below that Massachusetts law on commitment proceedings establishes such a duty. That argument is misplaced. If anything, as noted by the district court, the duty has been seen as one of not violating the right of the patient not to be improperly committed. Gilmore v. Buckley, 608 F.Supp. 554, 561 (D. Ma. 1985). Mass. Gen. Laws c.123, §15(e) authorizes the petition for commitment; it does not require it. Gilmore v. Buckley, 787 F.2d at 716, n.2, 722 n.14. Petitioner asserts in this Court for the first time that provisions of the Massachusetts Constitution (its Preamble and articles 5, 7, and 10 of the Declaration of Rights) somehow give rise to a federal constitutional duty to protect. The theory was never raised or argued in the district court or the court of appeals and will therefore not be reviewed here absent exceptional circumstances. Lawn v. United States, 355 U.S. 339, 362, n.16 (1957). Nor is the assertion supported by any citation to authority interpreting the provisions; instead petitioner merely recites them. For this reason alone, the argument should not be considered. Id. at 363, n.13.

The state psychiatrists had no custody or control over Gilmore. Nor did they or the county defendants "strip her of her capacity to defend herself or affirmatively place her in a position of danger that she would not otherwise have been in." Gilmore, 787 F.2d at 722.

While Doctors Fein and Koson were well aware of Patricia Gilmore's status as a possible victim of Prendergast, so was she; this is not a case where a failure to warn her about Prendergast could be considered to have placed her in a position of danger. Cf. Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984).

Nor did Bridgewater State Hospital have a custodial relationship with regard to Prendergast at the time of the murder or even while he was there for evaluation in aid of sentencing.

Prendergast was actually in the legal custody of the district court. Mass. Gen. Laws c.123, §15(e). The state psychiatrists knew Prendergast would be remanded to the custody of the district court for sentencing and incarceration. The lack of commitment did not provide Prendergast with any direct opportunity to harm Gilmore.[3/]

The First Circuit held, in accord with the rationale of Martinez, that

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3/ Beck v. Kansas University Psychiatry Foundation, 580 F.Supp. 527 (D. Kansas 1984), relied upon by petitioner, in reality undermines his argument, in that the psychiatrists who treated the murderer in that case were found not to have any liability because of their lack of custody and control over him at the time of his release. Moreover, the court in Beck erroneously based its finding of a constitutional duty on Kansas tort law.

absent such a special relationship in respect of Gilmore and the concomitant duty under the Fourteenth Amendment to provide protection of that person, the fact that the state and county defendants knew Gilmore to be a potential victim did not in and of itself convert Prendergast's murder of Gilmore into state action. Prendergast was simply not an agent of the state or county defendants. Those officials did not "create[] the threat" he posed to Gilmore; they neither "condoned, encouraged nor "ratified" his behavior.[4/] Gilmore,

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4/ See, Blum v. Yaretsky, 457 U.S. at 1004-1005 (state normally can be held responsible under Fourteenth Amendment for a private decision only when it has exercised coercive power or has provided significant encouragement, either overt or covert, that the choice in law be deemed that of the State); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

787 F.2d at 722; Cf. Martinez, 444 U.S. at 285; Beard v. O'Neal, 728 F.2d 894, 899 (7th Cir.), cert. denied, ____ U.S. ____, 105 S.Ct. 104 (1984).

The First Circuit therefore found that knowledge by the state and county defendants of Gilmore's plight, although relevant, went more toward the issue of state tort law concerning a "'duty' to avoid harm to his victim or to have proximately caused her death" Martinez, 444 U.S. at 285; concepts which are not the touchstone of the Due Process Clause and which do not reflect its overarching purpose. Id.; Paul v. Davis, 424 U.S. 693, 701 (1976); Daniels v. Williams, 106 S.Ct. at 665-666; Davidson v. Connor, 106 S.Ct. at 670.

Finally, the discussion, supra, makes it readily apparent that the instant case is truly fact-bound, unlikely to arise in the future with any regularity. This alone weighs against granting certiorari. Stern, Gressman and Shapiro, Supreme Court Practice, (6th ed. 1986) p.223.

II. EVEN IF A CONSTITUTIONAL VIOLATION CAN BE FOUND OR THERE IS A CONFLICT AMONG THE CIRCUITS, THIS COURT NEED NOT REACH THESE CLAIMS AS DEFENDANTS ARE IMMUNE FROM DAMAGES.

State officials are immune from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817-818 (1982).

It is plain from the discussion, supra that any constitutional right of the plaintiff which conceivably was violated by the conduct of Dr. Fein, Dr. Koson or Dr. Gilligan cannot possibly be said to have been clearly established at the time of their conduct.[5/] This is true even if they could be found to have violated some state law-created tort or statutory duty. Davis v. Scherer, ___ U.S. ___ 104 S.Ct. 3012, 3020 (1984).

As shown by the careful analysis in Jensen v. Conrad, 747 F.2d at 194-195, a constitutionally based affirmative duty to protect on the party of the govern-

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5/ The First Circuit did not reach this issue in light of its disposition of the case, Gilmore, 787 F.2d at 723, but the district court found that there could be no possible damage liability because of qualified immunity. Gilmore v. Buckley, 608 F.Supp. at 571.

ment and its officials was certainly not clearly established in 1979. The question was specifically left open in Martinez (decided January 1980), and addressed by the Second Circuit in 1981 only to the extent that the state was held responsible for the protection of an individual "'who had been placed in the government's custody or care. . .'" Doe v. New York City Dept. of Social Services, 649 F.2d 134 (2nd Cir. 1981). Bowers v. DeVito, supra in the Seventh Circuit in 1982, and Fox v. Custis, supra, a 1983 Fourth Circuit decision extended somewhat the general concept that a "custodial" or other "special" relationship might give rise to a Fourteenth Amendment claim, but left the

scope of such a qualifying relationship essentially undefined. Jensen, supra, at 193-194.

It cannot be said here that there were, in 1979, constitutional or statutory standards pertaining to a duty to protect even a known potential victim by initiating civil commitment proceedings of which the state defendants should reasonably have known.

Thus, even if a constitutional violation can be found or if this court finds there is a conflict among the circuits, the respondents would be entitled to immunity, and the issue of substantive constitutional law need not be reached. Rice v. Sioux City Cemetary, 349 U.S. at 74-77. Stern, Gressman & Shapiro, supra at 201.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BY: Roberta Thomas Brown

Roberta Thomas Brown
Legal Counsel to the
Attorney General
Paula J. DeGiacomo
Assistant Attorney General
Executive Bureau
One Ashburton Place, Rm 2001
Boston, MA 02108
Tel. (617) 727-2240